INDEX

CITATIONS

721719—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 589

THE EBLING BREWING CO., INC., PETITIONER

v.

PAUL A. PORTER, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 283–296) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on August 14, 1946 (R. 297). A petition for rehearing filed by the petitioner pursuant to Rule 27 of the Rules of the United States Emergency Court of Appeals was denied by final order of that court on September 9, 1946 (R. 313). The petition for a writ of

certiorari was filed on October 8, 1946. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. V, 924 (d), making applicable Section 240 of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether Maximum Price Regulation No. 259 and Revised Maximum Price Regulation No. 259,[1] which established as a brewer's maximum price for beer the highest price he charged either in October 1941 or March 1942 for the same or similar beer sold during either of these periods, plus specified increases, are invalid because they do not prohibit a brewer who produced two or more beers selling at different prices during the base period from increasing his production of his higher-priced beer at the expense of his lower-priced beer.

2. Whether the regulations are invalid because of the possibility that a higher maximum price might have been established for a new brewer's product than the maximum price for the product

[1] Maximum Price Regulation No. 259 was superseded, after institution of the protest proceedings before the Price Administrator which resulted in the review and judgment of the Emergency Court of Appeals which is the subject of this petition, by Revised Maximum Price Regulation No. 259. The changes made by the Revised Regulation do not affect the issues herein; both regulations may therefore properly be treated as one, and will hereafter sometimes be referred to collectively as "the Regulation".

of an established brewer who was selling beer during the base period.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of Maximum Price Regulation No. 259, as amended, appear in the Appendix, *infra,* pp. 14–19.

STATEMENT

The essential facts in this case may be summarized as follows:

On November 1, 1942, Maximum Price Regulation No. 259, fixing maximum prices for sales of malt beverages, replaced the General Maximum Price Regulation, which, since April 1942, had "frozen" maximum prices of such products at the highest prices charged for the same or similar products in March 1942. Maximum Price Regulation No. 259 used the same "freeze" technique, but authorized reference to alternative "base periods," October 1–15, 1941, or March 1942, at the seller's option, for determination of the maximum price. In addition, in computing maximum prices, Maximum Price Regulation No. 259 authorized sellers to add certain specified amounts to the base period prices to reflect increased taxes.

During the base period it selected, petitioner produced and sold one beer product under the brand name "Ebling's Extra." In June 1943,

petitioner ceased sale of its "Ebling's Extra," and shortly thereafter introduced a beer product under the name "Ebling's Special Brew Premium Beer." Pursuant to the provisions of the regulation then in effect, it established as the maximum price for that product the highest price charged by its competitors for so-called "premium" beers, which was higher than the highest price charged for petitioner's "Ebling's Extra" during the base period.

In August 1943 the regulation was amended (Amendment No. 2, 8 F. R. 10902) to require that the maximum price of a new malt beverage produced by a brewer was thereafter to be the highest price of the most similar beverage produced by that brewer for which a maximum price was established under the regulation. In addition, any brewer who had, between March 31, 1942 and August 9, 1943, the effective date of the amendment, introduced a "new" product, the maximum price of which had been determined by reference to a competitor's maximum prices, was required to determine the maximum price for such product by reference to his most similar beverage, if any, and was permitted to retain the maximum price predicated on his competitor's prices only if he had no similar beverage of his own with a maximum price established under the regulation.

Petitioner, on August 18, 1943, applied for permission to retain the prices on its "Ebling's Special Brew Premium Beer" which it had fixed by

reference to its competitor's maximum prices for "premium" beers. Permission was refused, and petitioner was required, by Order No. 2 under the regulation, to maintain as a maximum price for its "Premium" beer the highest price which it had charged for its "Ebling's Extra" during the base period.[2]

Petitioner, on January 15, 1944, filed a protest against that order and the regulation itself (R. 1–10), and, on April 30, 1945, filed another protest against the regulation alone (R. 160–164). Both protests were denied by the Price Administrator. Complaints were filed in the Emergency Court of Appeals against both denials, and after consolidation thereof in that Court for hearing and consideration, both complaints were ordered dismissed.

On October 24, 1946, by Amendment 69 to Supplementary Order No. 132,[3] price controls on malt beverages were lifted. However, a suit for treble damages against petitioner is now pending in the United States District Court for the Southern District of New York based upon alleged viola-

[2] Contrary to petitioner's statement that there is no dispute in this case that in point of ingredients and quality its "new" product differed from its old product (Pet. 5), the court below found that "the Administrator was warranted in finding that the complainant had failed to sustain its burden of establishing dissimilarity" (R. 290; see also R. 287, 289.) Therefore, since petitioner does not raise in this Court any issue as to distinctions between the two brews, it must be assumed for purposes of this proceeding that the two products were virtually the same.

[3] 11 F. R. 12621.

tions of the regulation which is the subject of this proceeding. Consequently the present case is not moot.[4]

ARGUMENT

1. *Limitation of brewers to price lines no higher than those in which they dealt prior to price control was a proper exercise of the Price Administrator's authority.*—In support of the petition it is charged that the regulation is discriminatory because it "freezes" petitioner to a maximum price equal to that charged in the base period for its so-called "regular" beer while allowing its competitors higher maximum prices for so-called "premium" beers.[5] That objection was considered in the court below and disposed of in the following language (R. 291–2):

> Under normal competitive conditions, a few well-advertised beers had achieved general public acceptance as "premium" products, and thus had commanded somewhat higher prices than the general run of beers. Brew-

[4] See *Montgomery Ward & Co.* v. *Bowles*, 147 F. 2d 858 (E. C. A.).

[5] The suggestion in petitioner's brief (p. 22) that its competitors, to the extent to which they may have shifted from lower-priced to higher-priced production, have or could have done so merely by charging the higher price for the same product formerly sold in the lower-priced line, is without foundation. Under the regulation, the maximum price of each separate product was frozen at its own base period price. Any increase in price of a low-priced product by a brewer merely on the ground that that brewer had a higher permissible price for another beer was clearly prohibited by the regulation.

ers who, like complainant, were caught with low freeze-date prices for their base period products were naturally under strong incentive to get rid of what they regarded as unsatisfactory maximum prices. Due to the lack of administratively workable objective standards of quality in the particular industry, it was possible for such brewers to introduce a new brand in substitution for the old, and, after inconsequential changes in ingredients or brewing processes, to assert that the new product was now comparable to "premium" brands customarily sold for higher prices. Due to wartime shortages and increased consumer demand, such new products were able to command premium prices. Under § 66 (h) of MPR 259 in its original form, the maximum price of a new brand was not determined by reference to the particular manufacturer's base period product, but was fixed on the basis of the most closely competitive seller's maximum price for a similar malt beverage. There is included in the transcript a copy of a bulletin by an organization of small brewers circulated among its membership of some 270 brewers throughout the United States calling attention to the inflationary possibilities under MPR 259 of getting rid of "low priced Beers" and introducing "Premium" products to be priced according to maximum prices of like premium products of their closest competitor. In Ambrosia Brewing Co. v. Bowles, 147 F. (2d) 550, 551 (1944), this court made ref-

721719—46——2

> erence to the inflationary practice which had developed under MPR 259 "of introducing new brands of beer on the market and pricing them in relation to high priced beers of competitors." Amendment No. 2 to MPR 259 was the Administrator's countermove to this inflationary threat, and under the circumstances we cannot say that the terms of Amendment No. 2 were arbitrary or capricious or inappropriate to effectuate the policies of the Act.

Petitioner urges, however, that any of its competitors who had maximum prices for both "regular" and "premium" beers might expand production of his "premium" beer at the expense of his "regular" beer and thus achieve a competitive advantage over the petitioner who could charge no more for any beer than his maximum price for "regular" beer. Petitioner charges that this possibility made the regulation discriminatory and thus invalid. This contention is as hypothetical as the illustration given in petitioner's brief (p. 22), since the record contains no substantial evidence of such shifts (R. 178). The court below, nevertheless, considered this objection and dismissed it in the following language (R. 294–5):

> The position in which complainant finds itself results from the fact that, in the base period prior to price control, complainant had priced its beer lower than the generally prevailing prices. The base period competi-

tive relationship existing between complainant's beer and so-called "premium" beers of other brewers is preserved in the regulation—a freeze type of price control fully authorized by the Act. *Pfeiffer Brewing Co.* v. *Bowles,* 146 F. (2d) 1006, 1008 (E. C. A. 1945), cert. denied 324 U. S. 865 (1945).

It is true that a movement in the industry in the direction of abandoning production of lower base period price lines and increasing production of higher priced products, if sufficiently widespread, would have inflationary tendencies that would warrant some special countermeasures by the Administrator. In certain industries the Administrator has sought to combat such diversion of output from cheaper to more expensive products by a special pricing technique known as the "maximum average price". Complainant's contention comes down to this: that a freeze type of regulation is invalid as against a manufacturer caught with a low base period price, unless the regulation contains something akin to a "maximum average price" limitation under which his multiple-brand competitors would be permitted to produce at a particular price line only that percentage of their sales which was equal to the percentage of that price line produced during the base period. We find nothing in the Act which would point to such a conclusion. In fact, in the recently enacted

> Price Control Extension Act of 1946, § 2 of the Act has been amended by the addition of a paragraph (p) providing that after July 1, 1946, "no maximum price regulation or order shall be issued or continued in effect requiring any seller to limit his sales by any weighted average price limitation based on his previous sales." But the basic authority of the Administrator to control prices on the freeze pattern has not been withdrawn.

In the face of this Congressional limitation it is submitted that it cannot be said that the Administrator was arbitrary and capricious in "freezing" prices and competitive price relationships without imposing a further control which Congress has now disapproved as a matter of policy.

It is plain from the regulation that its effect is to freeze the relationships between petitioner and its competitors as they existed during a period of free competition. In effect, petitioner complains that the regulation permits its competitors a flexibility of operations which is denied to it. If there is that result it occurs because the essence of the pre-price control relationship between petitioner and its alleged competitors was in the flexibility of the operations of those competitors as compared with an inflexibility in petitioner's operations. This relationship is con-

tinued under the regulation but was not created by it.

The authority of the Price Administrator to control prices by "freezing" price structures and price relationships which existed prior to price control has been uniformly upheld by the Emergency Court of Appeals. See *Chatlos* v. *Brown,* 136 F. 2d 490; *Consolidated Water Power and Paper Co.* v. *Bowles,* 146 F. 2d 492; *Hawaii Brewing Corp. Ltd.* v. *Bowles,* 148 F. 2d 846. Such action merely perpetuates the prices and price structures, and any differences therein, developed by the members of the industry in competition in the open market. That this is not discriminatory was recognized by this Court in *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251, when it was held that differentials which reflected pre-control industry practices were not in contravention of the constitutional guarantee of equal protection of the laws. The Court said (297 U. S. at 263):

> The appellant cannot complain if, in fact, the discrimination embodied in the law is but a perpetuation of a classification created and existing by the action of the dealers.

Petitioner is, in reality, seeking a place in the market similar to that achieved by the higher-priced products of competitors with which, in the

past, it voluntarily chose not to compete. It cannot complain of discrimination because it is not now permitted to gain the benefits of higher prices during a period of short supply which it would not, or could not, achieve in an uncontrolled market.

2. *Maximum Price Regulation No. 259 is not invalid because it is possible thereunder for a new seller to secure a higher maximum price for his product than is established for Petitioner's product.*—Petitioner also charges unfair discrimination because a seller of beer not in business during the base period might secure a higher maximum price than that which petitioner is permitted to charge.[6] But a distinction between old and new sellers, and assignment of prices reasonable of themselves to each category, is not discriminatory. It has been demonstrated that the maximum prices for established sellers were reasonable because they were the prices which each of those sellers chose voluntarily. Obviously the same technique was not available for establishing maximum prices for new sellers. Theoretically, a new seller might secure a maximum price higher than petitioner's, but a separate technique of pricing applicable only to new sell-

[6] The Court below pointed out that this objection, too, is largely hypothetical in nature (R. 295).

ers is not an unreasonable method of classification. *Pfeiffer Brewing Co.* v. *Bowles,* 146 F. 2d 1006 (E. C. A.), certiorari denied, 324 U. S. 865.[7] As the court concluded in the instant case (R. 295):

> Even though, under RMPR 259, a new brewer might possibly obtain maximum prices higher in some instances than those applicable to complainant's product, the classification is supportable on a rational basis. *Cf. Pfeiffer Brewing Co.* v. *Bowles, supra.* We agree with the statement in respondent's brief that, "in relation to existing prices as a whole, new brewers are not in a favored position; on the contrary, there is no opportunity for such new brewers even if they seek to compete with a seller having a higher maximum price to acquire prices above the industry average prices—an opportunity which was open to Complainant during and prior to the base periods."

It is submitted that the Emergency Court of Appeals was correct in holding that no showing had been made by petitioner of discrimination against itself sufficient to invalidate the regulation, and that such decision was fully in accord with applicable decisions of this Court, and with numerous prior decisions of the Emergency Court.

[7] *Cf. Mayflower Farms, Inc.* v. *Ten Eyck,* 297 U. S. 266.

CONCLUSION

The decision below is correct, and there is no warrant for further review. The petition should therefore be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

RICHARD H. FIELD,
General Counsel,
CARL A. AUERBACH,
Associate General Counsel,
WILLIAM R. MING, JR.,
SEYMOUR FRIEDMAN,
Office of Price Administration.

NOVEMBER 1946.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, c. 325, 58 Stat. 632, and by the Price Control Extension Act of 1946, Pub. Law 548, 79th Cong., 2d sess., are as follows:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution,

and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods.*[1] Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, *and shall give consideration to their recommendations.*[2] In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman

[1] Italicized words added by sec. 102 of the Stabilization Extension Act of 1944.

[2] See footnote 1.

from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, *and such recommendations shall be considered by the Administrator.*[3] Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection. *In administering the provisions of this subsection relating to the establishment of industry advisory committees, the Administrator, upon the request of a substantial portion of the industry in any region, shall promptly appoint a regional industry advisory committee for such region.*[4]

* * * * *

(c) Any regulation or order under this section may be established in such form and

[3] See footnote 1.

[4] Italicized words added by sec. 4 of the Price Control Extension Act of 1946.

manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. *Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs.*[5] Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Wenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the pos-

[5] See footnote 1.

session) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

Pertinent provisions of Maximum Price Regulation 259, 7 F. R. 8950, as amended by Amendment No. 2, 8 F. R. 10902, are as follows:

Section 66 * * *

(h) If the seller's maximum price for a domestic malt beverage to be priced cannot be determined under any of the above paragraphs of this section, the seller's maximum price for a domestic malt beverage shall be:

(1) *For manufacturers.* (i) The maximum price established by the manufacturer under the provisions of this regulation for the similar domestic malt beverage most nearly like it, for sales to purchasers of the same class: * * *

(ii) If the manufacturer's maximum price cannot be determined under (i), he shall apply to the Office of Price Administration for authorization to determine his maximum price in accordance with the maximum price established under this regulation by his most closely competitive seller of the same class for the similar domestic malt beverage most nearly like it, for sales to purchasers of the same class: * * *

(*a*) *Form and contents of application.* * * *

(*b*) *Approval of or objection to application.* If within 30 days after receipt of the application by the Office of Price Administration, the manufacturer shall not receive notice of objection to the maximum price

proposed in the application by letter from the Office of Price Administration, he shall be deemed authorized to establish such maximum price for sales of the item: *Provided,* That if within the 30-day period the Office of Price Administration shall by letter request supplemental information with respect to any matter set forth in the application, that period shall be figured from the date on which the requested supplemental information is received in writing by the Office of Price Administration. * * *

(*c*) *New products priced since March 31, 1942 and prior to August 9, 1943.* A manufacturer who since March 31, 1942 and prior to August 9, 1943 has established a maximum price for a domestic malt beverage newly produced by him, according to the maximum price of a competitor's similar item, shall within 30 days after the latter date apply to the Office of Price Administration for authorization to use the established price, in the manner prescribed under (*a*) and subject to the method of approval or objection prescribed under (*b*): *Provided,* That with respect to a domestic malt beverage for which an application is required to be filed pursuant to this paragraph, the manufacturer may not sell or deliver such item after August 8, 1943 until a maximum price is authorized under this paragraph, except under an agreement with the purchaser to adjust the selling price to a figure not higher than the maximum price which is later authorized under this paragraph. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1946